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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT HESSELGESSER, et al., Plaintiffs and Appellants, v. CITIBANK, N.A., Defendant and Respondent.	B199029 (Los Angeles County Super. Ct. No. BC360053)

APPEAL from a judgment (order striking the complaint) of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Plaintiffs and Appellants.

Musick, Peeler & Garrett, Barry D. Hovis and Cheryl A. Orr for Defendant and Respondent.

INTRODUCTION

This appeal is taken from the trial court's order, made pursuant to an anti-SLAPP motion, striking a complaint for malicious prosecution. The malicious prosecution action was initiated after a bank failed to prevail in an action against a corporation and its shareholders for breach of a guaranty executed by the corporation's president. The trial court granted the anti-SLAPP motion, finding that the plaintiffs had failed to establish a probability of prevailing on the merits because probable cause existed for the bank to bring its lawsuit. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Execution of the Guaranty

B & H Custom Window and Door, Inc. (B & H) was incorporated in 1992. B & H sold, finished and installed doors and windows. Russell Crawford was the president and majority shareholder, owning 60 percent of the company. The other shareholders and officers were Thomas Hand (vice president), Steven Bernstein (secretary), and Robert Hesselgesser. $5,000 was allocated proportionately to capitalize the company but there is no evidence any of the four men paid for their shares.

This case involves a $750,000 guaranty issued to Bank[1] by B & H to support a loan made by Bank to Crawford. The guaranty is dated August 1, 1993 and lists Crawford as the borrower and B & H as the guarantor. Crawford signed the

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[1] Transworld Bank was the lending bank on whose behalf the guaranty was executed. It was subsequently acquired by Glendale Federal Savings and Loan Association. In turn, California Federal Bank acquired Glendale Federal. Several years later, Citibank (West) FSB (now Citibank, N.A.), respondent on this appeal, acquired California Federal. Our reference to "Bank" in this opinion does not distinguish between the banking entities.

guaranty on behalf of B & H as "Russell Crawford, President." In reality, Crawford had no authority to execute the guaranty. During this transaction, Bank was represented by Richard Norkin, the manager of Bank's Chatsworth branch. Crawford was one of Bank's key customers at that branch. Norkin had dealt with Crawford and other Crawford-owned businesses since 1982, making multiple loans (all of which required guaranties).

In 1994, B & H's shareholders learned that Crawford was embezzling corporate funds. In 1995, Hand and Hesselgesser learned about the 1993 guaranty for the first time. That year, Crawford resigned as president, admitting he had stolen between $500,000 and $750,000. Crawford was subsequently convicted by plea of forgery and loan fraud.

Meanwhile, Crawford defaulted on the loan backed by the guaranty. Bank made demands for payment on Crawford and B & H. Bank eventually obtained a default against Crawford. Bank sued B & H for breach of guaranty and money had and received and later amended its complaint to include alter ego allegations against Hand and Hesselgesser. B & H prevailed following a jury trial and Hand and Hesselgesser prevailed in a summary judgment proceeding. Because each proceeding involved different issues, we discuss them separately for purposes of clarity. We begin with the jury trial.

B. The Jury Trial On Bank's Action Against B & H

1. *Issues and Evidence at Trial*

Because Crawford had not been authorized to sign the guaranty on B & H's behalf, Bank relied upon Corporations Code section 313 (section 313) to enforce the guaranty. The statute provides that a contract (including a guaranty) signed by the president of a corporation is valid and enforceable against the corporation even if the individual (here, Crawford) lacked authority to make the agreement "in the

absence of actual knowledge of the part of the other person [here, Bank acting through Norkin] that the signing officer[] had no authority to execute the same."

Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal.4th 754 held that section 313 "precludes the invalidation of an instrument entered into by a corporation, *despite* the presentation of evidence demonstrating that the signing officers lacked authority to execute the instrument on its behalf. Thus, the statute provides a conclusive, rather than a merely rebuttable, evidentiary presumption of authority to enter into the agreement on the part of the specified corporate officers." (*Id*. at p. 782.) Consequently, "section 313 applies so long as the other party does not have *actual knowledge* that the executing officers lack authority. Because the statute applies even when the other party should have, but does not have, actual knowledge of the officers' lack of authority, that party is relieved of the burden of establishing *justifiable* reliance upon the authority of the executing officers." (*Id*. at p. 783.) This "limits the burden of proof, insofar as the third party's knowledge is concerned, to a showing that he or she did not have actual knowledge of any lack of authority on the part of the signing officers." (*Ibid*.)

Given the above statutory and decisional law, a key issue at trial was Bank's actual knowledge when the guaranty was executed. In that regard, the jury was (properly) instructed that Bank could enforce the guaranty unless prior to its execution, Bank had actual knowledge of Crawford's lack of authority. As will be seen, the jury resolved the issue against Bank.

Norkin gave conflicting and contradictory testimony on the point.[2] On the one hand, he testified that when the guaranty was executed, he believed that Crawford was the sole shareholder of B & H and held all of its corporate offices.

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[2] Crawford did not testify at the trial.

He claimed that at the time (1993), he had no actual knowledge that Crawford lack the authority to execute the guaranty. He did not learn Crawford was not the sole shareholder of B & H until some time between fall 1994 and late 1995. However, Norkin conceded that when the loan was made and the guaranty executed, he had not requested a copy of B & H's articles of incorporation or sought verification that Crawford was its sole shareholder.

Norkin further testified on direct examination that on August 1, 1993, Crawford gave him a corporate resolution, dated August 1, 1993, certifying that the B & H directors had met on July 30, 1993 and authorized Crawford to make B & H a guarantor on loans from Bank to Crawford.[3] The corporate resolution is not signed by B & H's secretary Bernstein but, instead, is signed by one Lysholm, identified as "Secretary or Assistant Secretary." Lysholm had been the controller at Valley Building Materials, a business Crawford had owned prior to B & H's incorporation. However, on cross-examination, Norkin testified he could not remember the day he received the corporate resolution. In addition, Norkin gave conflicting testimony about his ability to recognize Lysholm's signature.

Bank also presented an expert witness. In his opinion, nothing presented to Norkin indicated that B & H had shareholders in addition to Crawford. He believed that Norkin (and therefore Bank) could accept Crawford's representations at face value given their long-standing business relationship. However, he conceded that a corporate guarantee of an individual loan was highly unusual, occurring in less than one percent of loans.

B & H, which had no direct evidence to establish Norkin's actual knowledge of Crawford's lack of authority, presented its own expert. He testified that he had

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[3] Crawford's signature was on the resolution as the person designated by B & H to act on its behalf in executing a guaranty.

never seen a corporation guarantee a loan to an individual and opined that Bank, through Norkin, had failed to conduct a proper investigation before accepting the guaranty. In addition, B & H offered circumstantial evidence to establish Norkin's actual knowledge of Crawford's lack of authority. This included evidence about Norkin's prior dealings with Crawford and his associates from which it could be inferred that Norkin had actual knowledge that Crawford was not the only shareholder of B & H and that Crawford lacked authority to sign the guaranty. B & H also presented evidence that the guaranty had been prepared after the fact and backdated with Norkin's knowledge to suggest Norkin was not a credible witness and was implicated in wrong-doing. B & H argued that Norkin had failed to conduct a due diligence search prior to making the loan and that Norkin was lying at trial to cover up his own misconduct in handling the transaction.

2. *The Jury's Verdicts*

The jury returned a 9-3 verdict for B & H on the cause of action for breach of guaranty. The jury returned an 11-1 verdict for Bank for $80,000 for money had and received.

3. *The Post-Verdict Motions*

Bank moved for judgment notwithstanding the verdict on the cause of action for breach of the guaranty. The trial court denied the motion. Its ruling explained: "[T]here was conflicting evidence as to Bank's actual knowledge of Crawford's lack of authority." After canvassing specific evidence (in particular, various conflicts in Norkin's testimony), the trial court concluded: "Accordingly, it could be reasonably inferred from the evidence that Bank was not without actual

knowledge of Crawford's lack of authority to execute the Guaranty. *Bank had the burden to show that it did not have actual knowledge. The jury apparently found that Bank failed to present sufficient evidence to carry its burden*." (Italics added.)

B & H moved for judgment notwithstanding the verdict on the claim for $80,000 money had and received. The trial court granted the motion. It concluded: "No evidence that was presented at trial—nor any inference that may be drawn therefrom—supports a finding that B & H had, received, used, or benefitted from Bank funds [disbursed to Crawford]."

4. *The Appeal*

Bank appealed from the adverse judgment. (*California Federal Bank v. B & H Custom Window & Door, Inc.*, B167651.)

Primarily, Bank contended that substantial evidence did not support the jury's implied finding that Bank actually knew Crawford lacked authority to bind B & H on the guaranty. The court of appeal disagreed. It found that ample evidence supported the jury's implied findings that Norkin's testimony was not credible and that Bank, through Norkin, knew of B & H's other shareholders and Crawford's lack of authority.

Bank also assigned as error the trial court's grant of B & H's motion for judgment notwithstanding the verdict on the cause of action for money had and received. The appellate court upheld that ruling. It reasoned that no evidence had been presented to support the jury's implied finding that any money Crawford had supplied to B & H came from the loan proceeds backed by the 1993 guaranty as opposed to Crawford's other substantial assets.

C. Bank's Alter Ego Allegations Against B & H Shareholders

Bank filed its original complaint against B & H for breach of the guaranty and for money had and received in February 1996. For reasons not relevant to this appeal, the case was not prosecuted for several years. Eventually, Bank deposed Hesselgesser and Hand in 2000 and learned the following facts. After B & H was incorporated in 1992, no shareholder or director meetings were held; no stock certificates were issued; and each shareholder had made, at most, a capital contribution of $667. Based upon these facts, Bank concluded that the lack of corporate formalities and lack of capitalization supported alleging an alter ego claim against Hesselgesser, Hand and Bernstein.

In June 2001, Bank moved for leave to file an amended complaint to add as alter ego defendants B & H's three other shareholders. Over defense objection, the trial court granted Bank's motion. Because Bank was unable to locate and serve Bernstein, it later dismissed him from the case without prejudice.

Hesselgesser and Hand thereafter moved for summary judgment. They did not contest the elements of unity of interest between themselves and B & H or B & H's failure to observe corporate formalities. Instead, they advanced two other separate grounds to support their request. First, they argued that Bank could not establish the other predicate for alter ego liability: an injustice would result if they, as individuals, were not held personally liable. In particular, they urged there was no evidence of fraud or wrong doing on their part. Second, they relied upon the defense of laches. They claimed that material evidence had been lost because of the delay (five and a half years) between the filing of the original complaint and the first amended complaint. For instance, Bank had lost or destroyed the original loan file relating to the 1993 guaranty.

The trial court granted summary judgment on both grounds. First, it found that the "facts proffered by [Bank], at best, show unity of interest. [Bank] has not

presented any evidence of fraud or wrongdoing by Hand [or Hesselgesser]. Accordingly, summary judgment is proper." In addition, the trial court found that because Bank did "not dispute the loss of material evidence[,] [Bank had] not raised a triable issue of material fact as to the application of the doctrine of laches."

Bank appealed the grant of summary judgment (*California Federal Bank v. Hesselgesser, M.D., et al.*, B161241). While that appeal was pending, the court of appeal rendered its decision on Bank's appeal from the judgment entered following the jury trial. As set forth above, the appellate decision was adverse to Bank; the court upheld the judgment in favor of B & H. This result rendered moot any claims Bank had against Hand and Hesselgesser as the alter egos of B & H. Accordingly, Bank dismissed the appeal from the summary judgment.

D. The Malicious Prosecution Action and the Anti-SLAPP Motion

In October 2006, B & H, Hand and Hesselgesser sued Bank for malicious prosecution.[4]

Bank filed a motion to strike the complaint based upon the anti-SLAPP statute. Bank asked the trial court to take judicial notice of the appellate decision in the Bank's action, Bank's motion for leave to amend its complaint to allege alter ego liability against Hand and Hesselgesser which included a supporting declaration from counsel, and the trial court's rulings on post-verdict motions in the action which went to trial.

Bank also offered the declaration of Delia Guevara, in-house counsel for Bank. Her declaration explained that she was first assigned the file in 1999. She

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[4] The complaint also named Bank's attorneys as defendants. However, the subsequent anti-SLAPP motion addressed only Bank's liability. Consequently, this appeal raises no issue about counsel's potential liability for malicious prosecution.

spoke with the outside attorney then handling the case about the lawsuit's status. The matter was subsequently referred to another outside attorney (Hosack). Guevara asked him to review the file and "provide legal advice as to the merits of the case and whether [it] should be pursued." Hosack reviewed the Bank's file and the court file, spoke with prior counsel, and conducted legal research. Hosack told Guevara "the case had merit" and advised Bank to continue with the action.

Guevara further explained that after outside counsel deposed Hand and Hesselgesser and learned that B & H was undercapitalized and had failed to observe any corporate formalities, outside counsel advised "that these deficiencies would establish a *prima facie* case against the individual shareholders and recommended that the Bank file a motion to amend the complaint to add [them] as individual defendants." Based upon that recommendation, Guevera authorized counsel to file a motion for leave to file an amended complaint to include alter ego allegations against the individual shareholders of B & H. After the trial court granted summary judgment in favor of Hand and Hesselgesser, Hosack's firm believed that ruling was error and recommended taking an appeal.

Guevera explained that throughout the proceeding, "Bank advised [outside counsel] of the facts of which it was aware regarding the background of the matter" and outside counsel stated Bank's claims were meritorious. She concluded that she relied upon outside counsel's advice "in recommending within the Bank that the matter should be pursued."

B & H's opposition to the motion to strike asked the trial court to take judicial notice of additional matter from the trial court proceedings. B & H also asked for judicial notice of the appellate opinion affirming the judgment in its favor. In addition, B & H filed evidentiary objections to portions of Guevara's declaration.

Bank's reply to B & H's opposition included another declaration from Guevara as well as a declaration from the attorney who handled Bank's appeals.

At the hearing conducted on the anti-SLAPP motion to strike the complaint, B & H asked the trial court to rule upon its written objections to Guervara's first declaration. In addition, B & H objected to the two declarations Bank had proffered with its reply. B & H urged the declarations were untimely and were substantively defective on multiple grounds. The trial court, however, failed to rule on any of these objections. After the parties presented argument, the trial court granted the motion to strike. It found that B & H had "not been able to establish a probability of prevailing on the merits as probable cause existed for Bank to maintain each of the causes of action."

This appeal by B & H, Hand and Hesselgesser (collectively B & H) followed.

DISCUSSION

A. Evidentiary Objections

B & H first contends that the trial court committed prejudicial error in failing to rule upon its objections to the three declarations offered by Bank.

As set forth above, prior to the hearing on the anti-SLAPP motion, B & H filed written objections to Guevara's first declaration. At the hearing, B & H asked the trial court to rule on those objections. In addition, B & H raised multiple explicit objections to the two declarations attached to Bank's reply. Nonetheless, the trial court failed to rule. B & H's objections have been preserved for appeal. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 713.)

Guevara's first declaration explained that as Bank's in-house counsel, she referred the case to outside attorneys for review and advice. She set forth the advice those attorneys gave and Bank's reliance thereon. B & H raised objections

of relevance, hearsay, and lack of foundation. These objections lack merit. The statements in the declaration were relevant to explain why Bank pursued the litigation: advice of outside counsel. The statements were not hearsay because they were not offered for the truth of the matter asserted (to prove Bank's action had merit) but were offered for a non-hearsay purpose: to establish the effect of the statements on the listener, e.g., to explain that Bank, acting through Guevara, decided to proceed with the lawsuit based upon advice it received from outside counsel. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 13.) Lastly, an adequate foundation was laid for Guevara's averments because she had personal knowledge as to what she did and what she was told. Because the objections would have been overruled had the trial court acted, B & H has not been prejudiced by the trial court's failure to rule.

To the extent to which Guevara's declaration was improper (recounting evidence presented at trial, authenticating trial exhibits, etc.), any failure by the trial court to strike those portions of her declaration was harmless because all of that information was provided to the court in proper format, including but not limited to the appellate decision reviewing the jury trial as well as various trial court rulings.

As for the two declarations offered by Bank with its reply to B & H's opposition to the anti-SLAPP motion, it was improper for Bank to tender additional evidence with its reply papers. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) However, B & H could not have been prejudiced by the trial court's failure to strike these declarations because each contained only further detail about matter properly and adequately covered in Guevara's first declaration: advice from outside counsel and Bank's reliance thereon.

In sum, the trial court's failure to rule upon B & H's evidentiary objections to the three declarations was harmless.

B. The Trial Court's Grant of the Anti-SLAPP Motion

1. *A Motion to Strike Brought Pursuant to the anti-SLAPP Statute*

Under the anti-SLAPP statute, the defendant (here, Bank) must first establish that the plaintiff's cause of action arises from the defendant's exercise of the right of petition or free speech. Here, it is undisputed that a cause of action for malicious prosecution falls within the anti-SLAPP statute because it arises from protected activity: Bank's filing and prosecution of the underlying unsuccessful lawsuit. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.)

Accordingly, the burden shifted to the plaintiffs (here, B & H, Hand and Hesselgesser) to "establish[] that there is a probability that [they] will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) In that regard, they were required to demonstrate that the complaint was "'"supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) In deciding whether they had met that burden, the trial court could "also consider a defendant's opposing evidence to determine whether it defeats [the] plaintiff[s'] case as a matter of law." (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

A trial court must grant the anti-SLAPP motion unless "'"the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff."'" (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1421.) "This standard is 'similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment,' in that

the court cannot weigh the evidence." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010.)

We review the trial court's decision de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) That is, we exercise our independent review to determine whether B & H, Hand and Hesselgesser met their burden of demonstrating a probability of success on the merits of their malicious prosecution claim. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1145.)

2. *The Elements of Malicious Prosecution*

There are three elements to a claim for malicious prosecution: (1) the prior lawsuit terminated in favor of the plaintiff on the merits; (2) the defendant initiated the prior lawsuit without probable cause; and (3) the defendant initiated the prior lawsuit with malice. (*Soukup, supra*, 39 Cal.4th at p. 292.) A plaintiff must establish all three elements to prevail. If a defendant in an anti-SLAPP motion demonstrates that one element cannot be established, the trial court must grant the motion to strike.

A favorable termination means that the termination of the prior lawsuit reflected on the merits of the action and the plaintiff's lack of responsibility or liability for the alleged misconduct. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 198.)

The probable cause standard to commence a civil action is lenient, reflecting the important public policy of avoiding the chilling of debatable legal claims. Consequently, its existence or nonexistence "is a legal question to be resolved by the court in the malicious prosecution case; litigants are thus protected against the danger that a lay jury would mistake a merely unsuccessful claim for a legally untenable one. [Citation.] . . . [P]robable cause is determined objectively, i.e.,

without reference to whether the attorney bringing the prior action believed the case was tenable." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*).) The test is whether any reasonable attorney would have thought the claim tenable. Only an action that a reasonable attorney would agree is totally and completely without merit can form the basis of a malicious prosecution action. (*Ibid*.) Probable cause, moreover, must exist for every cause of action advanced in the underlying action

"'The "malice" element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than . . . the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* motive.' [Citation.] . . . Malice may also may be inferred from the facts establishing a lack of probable cause.' [Citation.]" (*Soukup, supra*, 39 Cal.4th at p. 292.*)*

3. *Bank Had Probable Cause to Sue B & H for Money Had and Received*

As noted earlier, Bank obtained a jury verdict in its favor on the cause of action for money had and received. Even though the trial court thereafter granted B & H's motion for judgment notwithstanding the verdict, the jury verdict established that Bank had probable cause to bring that claim. "It is the law in California that a plaintiff's victory at trial (unless it is obtained by means of fraud or perjury) will act as conclusive proof that there was probable cause for the plaintiff to file the suit, and will thus preclude a cause of action by the defendant for malicious prosecution, *even if the victory is reversed by a trial court . . . by entry of a judgment notwithstanding the verdict*[.] [Citations.] 'The rationale is that approval by the trier of fact, after a full adversary hearing, sufficiently demonstrates that an action was legally tenable[;] success at trial shows that the

suit was not among the least meritorious of meritless suits, those which are totally meritless and thus lack probable cause.' [Citation.]" (*Bergman v. Drum* (2005) 129 Cal.App.4th 11, 21, italics added.)

4. *Bank Had Probable Cause to Sue B & H for Breach of Guaranty*

Malicious prosecution is a disfavored tort "because of its 'potential to impose an undue "chilling effect" on the ordinary citizen's willingness . . . to bring a civil dispute to court' [citation] and because, as a means of deterring excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself." (*Wilson, supra*, 28 Cal.4th at p. 817, quoting from *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872.)

"The question of probable cause is 'whether, as an objective matter, the prior action was legally tenable or not.' [Citation.] 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.] 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.'" (*Soukup, supra*, 39 Cal.4th at p. 292.)

Here, Bank had probable cause to sue B & H for breach of the guaranty. According to branch manager Norkin, Crawford (the president of B & H) presented him with a corporate resolution certifying that B & H had authorized him (Crawford) to commit B & H as a guarantor on loans to Crawford. Further, Norkin believed that Crawford was B & H's only shareholder. Norkin claimed that when the guaranty was executed, he had no actual knowledge that Crawford lacked the authority to execute the guaranty on behalf of B & H. Given this evidence, Bank could objectively believe its action was legally tenable.

To defeat this conclusion, B & H urges that, from the outset, Bank "had actual knowledge the guaranty was invalid, unauthorized, and unenforceable." The record relied upon by B & H does not support this characterization of Bank's knowledge. B & H relies upon the inconsistencies and contradictions in Norkin's testimony about the operative events and the fact that the jury resolved the issue adversely to Bank, a verdict upheld on appeal. This approach misses the point. "Plainly, a claim that appears 'arguably correct' or 'tenable' when filed with the court may nevertheless fail, as [Bank's] did, for reasons having to do with [the credibility of the witnesses or] sufficiency of the evidence actually adduced as the litigation unfolds. . . . [E]very case litigated to a conclusion has a losing party, but that does not mean the losing position was not arguably meritorious when it was pled. [Citation.] And just as an action that ultimately proves nonmeritorious may have been brought with probable cause, successfully defending a lawsuit does not establish that the suit was brought without probable cause. [Citations.]" (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at pp. 742-743.) In other words, the fact that B & H was able to successfully impeach at trial Norkin's claim of no actual knowledge about Crawford's lack of authority does not establish that Norkin's testimony was false. As the trial court indicated in denying Bank's motion for judgment notwithstanding the verdict, the jury apparently concluded that Bank had failed to carry its burden of establishing a lack of actual knowledge. But this failure of proof does not equate with a finding that Bank presented false evidence.

Further, even if Bank knew of B & H's impeachment evidence (a fact not established by B & H), that does establish Bank lacked probable cause to initiate the action. "A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim.

Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious. [Citation.]" (*Wilson, supra*, 28 Cal.4th at p. 822.) "Indeed, a plaintiff or his or her attorney may *not* be aware, when initiating the action, of evidence in the defendant's possession that weighs against the claim. . . . [Hence], probable cause to bring an action depends on the facts known to the litigant or attorney at the time the action is brought. [Citation.]" (*Id*. at p. 822, fn. 6.)

For similar reasons, we reject B & H's argument that Bank could not rely upon section 313 "to provide probable cause for its lawsuit" because "Crawford openly used B & H to obtain a benefit for himself, a benefit in which B & H would not share."[5] The problem with this argument is that it looks at the evidence only from B & H's point of view and ignores the contrary evidence: Norkin's testimony. Objectively, Bank could reasonably rely upon Norkin's testimony to conclude that it had a tenable claim that section 313 permitted it to enforce the guaranty because it (acting through Norkin) had no actual knowledge about Crawford's lack of authority.

Lastly, B & H argues that there was a conflict in the evidence about "what [Bank] knew – or whether [Bank] knew that the factual allegations underlying its claims were untrue" requiring a jury to "resolve this conflict before the trial court

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[5] B & H cites *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116 to support this argument. The case is clearly distinguishable. It did not involve an anti-SLAPP motion and did not address the issue of probable cause to bring a lawsuit. Instead, it involved review of the sufficiency of the evidence to sustain a jury verdict that a church was liable on a promissory note signed without authorization by its president, an errant pastor. The appellate court reversed that finding based upon the specific factual matrix presented. (*Id*. at pp. 1140-1142.)

[could] determine whether probable cause existed." We disagree. B & H's claim of an evidentiary conflict is based upon the same circumstantial evidence arguments it successfully advanced at the trial to persuade the jury that Bank had not carried its burden of establishing that it had no actual knowledge of Crawford's lack of authority. This approach is not persuasive. That Bank did not prevail at trial does not create an evidentiary conflict about what Bank knew when it filed and litigated the case. That failure, as explained above, simply reflects a failure to meet its burden of proof.

5. *Bank Had Probable Cause to Bring Its Alter Ego Claim*

The first issue is whether the trial court's grant of summary judgment for Hand and Hesselgesser on the basis of laches constituted a favorable termination within the meaning of the tort of malicious prosecution. It did not. (*Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 836-838.) A termination is considered favorable if its nature is such as to indicate that defendants were not liable. To establish laches, the defense was required to show an unreasonable delay in filing the amended complaint and prejudice resulting from that delay. The trial court granted summary judgment, finding there was no triable issue about the materiality of the evidence lost because of the delay. Hand and Hesselgesser's success on this point has no bearing on whether they could be held liable as the alter egos of B & H. (*Ibid*.) It therefore did not constitute a favorable termination.

The trial court also granted summary judgment finding no triable issue of fact on one element of alter ego. This constituted a favorable termination. (See *Ray v. First Federal Bank* (1998) 61 Cal.App.4th 315, 318-319.) The issue becomes whether Bank, nonetheless, had probable cause to bring the alter ego claim. It did.

There are two requirements for application of the alter ego doctrine: "(1) [T]here be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796; see also *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538-539.)

The facts which establish "unity of interest" vary from case to case but can include the failure to adequately capitalize the corporation and the failure to observe corporate formalities. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285, fn. 13, citing *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825.) Here, Bank had the evidence on both those points based upon the deposition testimony of Hand and Hesselgesser. Nonetheless, B & H urges that Bank did not have probable cause to amend the complaint to include the alter ego allegations because, as reflected by the trial court's grant of summary judgment in favor of Hand and Hesselgesser, Bank had no evidence that an inequitable result would follow if the act in question (B & H's guaranty) was treated only as that of the corporation.

We are not persuaded because B & H overlooks another critical factor: after Hand and Hesselgesser were deposed, Bank relied upon the advice of outside counsel to bring its motion to amend. This establishes that there was probable cause to bring the alter ego claims. (*Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 288 ["Reliance upon the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause"].)

DISPOSITION

The judgment (order striking the complaint pursuant to Code Civ. Proc., § 425.16) is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.